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No. 10-1020

IN THE
Supreme Court of the United States

CONSOLIDATION COAL COMPANY ET AL.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Steven P. McGowan
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326
(304) 353-8114

Ernest A. Young
Counsel of Record
127 Turvey Court
Chapel Hill, NC 27514
(919) 613-8506
Young@law.duke.edu

March 16, 2011

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D C. 20002

QUESTIONS PRESENTED

1. Whether the canon of avoidance may be applied to re-characterize arguably unconstitutional government conduct as constitutional, rather than to construe the permissible scope of government conduct in the first instance?

2. Whether the *Chevron* doctrine that courts must defer to reasonable agency interpretations of ambiguous federal statutes trumps the canon of constitutional avoidance?

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INTEREST OF AMICI

Amici are scholars of constitutional and public law.[1] Our teaching and scholarly writing concerns the canon of constitutional avoidance in statutory construction, the relationship between Congress, federal administrative agencies, and the courts, and the constitutional values that the avoidance doctrine protects.

Ian Bartrum is an Assistant Professor of Law at Drake University Law School, where he teaches Constitutional Law. Erwin Chemerinsky is the Founding Dean and a Distinguished Professor at University of California-Irvine School of Law, where he teaches Constitutional Law. Neal Devins is the Goodrich Professor of Law at William & Mary Law School, where he teaches Civil Rights Law and Constitutional Law. David L. Franklin is a Professor of Law at Depaul University College of Law, where he teaches Constitutional Process and Administrative Process. Claire Kelly is Professor of Law at the Brooklyn Law School, where she teaches Administrative Law. Kermit Roosevelt is a Professor of Law at the University of Pennsylvania Law School, where he teaches Constitutional Law and Federal Jurisdiction. Adam Winkler is Professor of Law at the UCLA School of Law, where he teaches Constitutional Law. Ernest A. Young is the Alston &

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

Bird Professor at Duke Law School, where he teaches Constitutional Law and Federal Jurisdiction.

SUMMARY OF THE ARGUMENT

This case raises fundamental questions about the doctrine that courts interpret an ambiguous federal statute to avoid serious constitutional doubts about that statute's validity. The Federal Circuit applied that rule in two ways in the present litigation. First, it construed the tax on coal imposed by the Surface Mining Control and Reclamations Act of 1977 (SMCRA), 30 U.S.C. § 1232(a), on "coal produced" in the United States to apply to the *extraction* of coal. The court of appeals reasoned that a tax on the *sale* of coal would violate the Export Clause of the Constitution. In reaching that holding the Federal Circuit refused to follow either the interpretation adopted by the Office of Surface Mining Reclamation and Enforcement (OSM) after notice and comment rulemaking or a decision of the D.C. Circuit deferring to OSM's interpretation.

Second, the Federal Circuit characterized OSM's prior practice in implementing the reclamation tax to amount to a tax on coal extraction as well. The court of appeals reached that conclusion, notwithstanding the fact that OSM had actually assessed the tax upon the sale of coal. Thus, OSM had calculated the tax according to the coal's weight and value at the time of sale rather than extraction, and moreover had not taxed coal that had been extracted but remained unsold. The court of appeals thus took the unusual step of applying the avoidance canon not to interpret how the tax shall be constitutionally applied but rather to *re-characterize*

what the Government had done in the past as constitutional rather than unconstitutional.

Amici contend that both these uses of the avoidance canon raise questions worthy of consideration by this Court. The Federal Circuit's construction of the OSM's past implementation of the tax through its regulation fundamentally departed from the canon's ordinary operation in a way that threatens to distort significantly how that canon functions in constitutional litigation. There is no dispute in this case about how the reclamation tax has historically operated; the court of appeals thus did not "avoid" constitutional questions under the Export Clause by construing the tax to apply more narrowly or at an earlier time in the production process. Rather, the debate concerned whether a tax assessed at sale should nonetheless be characterized as a tax on extraction. By using the avoidance canon to answer that question in the affirmative, the Federal Circuit turned the canon into a strong presumption of constitutionality that operates whenever governmental conduct may plausibly be described in more than one way. This radical new version of the avoidance canon effectively *narrows* the operative force of constitutional principles.

The Federal Circuit's construction of the underlying statute also raises important questions about the interaction between the avoidance canon and *Chevron*'s doctrine of deference to administrative agencies. By rejecting a *Chevron*-based interpretation of the tax as falling on sale and instead adopting a contrary interpretation to avoid problems under the Export Clause, the court of appeals held that *Chevron* does not trump avoidance

concerns. It thus sided with the Tenth Circuit against the Second and Ninth Circuits, which have held that courts lack authority to avoid constitutional questions by rejecting prior interpretations by agencies. *Amici* agree with Petitioners that this question is certworthy, although we do not share Petitioners' view that *Chevron* should prevail in this situation. Nonetheless, this disagreement does not alter our view that, given the Federal Circuit's misapplication of the avoidance doctrine to this case, the judgment below should be reversed.

ARGUMENT

I. The Avoidance Doctrine Does Not Permit Courts to Re-characterize Past Government Conduct as Lawful.

This Court's leading decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), illustrates the proper operation of the doctrine of constitutional avoidance. In *DeBartolo*, the National Labor Relations Board (NLRB) had barred peaceful handbilling by a union pursuant to § 8(b)(4) of the National Labor Relations Act, which says a union may not "threaten, coerce, or restrain" any person to make the person cease doing business with another person. Although the union argued that construing this provision to reach peaceful handbilling would violate the First Amendment, the agency rejected this argument, stating that "as a congressionally created administrative agency, we will presume the constitutionality of the Act we administer." 485 U.S.

at 573 (quoting 273 N.L.R.B. 1431 (1985)). This Court rejected the NLRB's interpretation, holding that "the Board's construction of the statute . . . poses serious questions of the validity of § 8(b)(4) under the First Amendment." *Id.* at 575. The Court thus applied the "elementary rule" of constitutional avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

In *DeBartolo*, the Court construed the NLRA not to apply to the union's conduct, because the NLRB's interpretation would have raised serious questions about the constitutionality of the statute. The Court did *not* do what the Federal Circuit did in the present case, which was to leave the Government's past action unaltered and "avoid" the constitutional question simply by recharacterizing the Government's action as constitutional. The Federal Circuit's approach to avoidance—if allowed to stand by this Court—has the potential to radically alter the meaning of the avoidance rule in a broad range of constitutional challenges to government action.

A. The Federal Circuit's holding in this case transformed the avoidance canon from a means of shielding constitutional values to a tool for narrowing those values.

The avoidance doctrine ordinarily applies to determining what a statute or regulation *does*—that

is, what it requires, how far it extends, and the like. The doctrine tends to narrow governmental enactments by construing them not to extend into constitutional "danger zones." At an earlier stage of the present litigation, the Federal Circuit properly determined that it could avoid a constitutional difficulty under the Export Clause if it construed the statutory language "coal produced" to apply only to coal *extracted*—not to coal *sold*. *Consolidation Coal Co. v. United States*, 528 F.3d 1344, 1348 (Fed. Cir. 2008) (*Consol III*).[2] It thus narrowed the statutory tax to apply only to extraction rather than sale, because a tax on sale would violate the Export Clause's prohibition of "any federal tax . . . on goods in export transit." *United States v. United States Shoe Corp.*, 523 U.S. 360, 367 (1998).

The Federal Circuit's subsequent decision after remand, however, did something radically different. In that opinion, the question was whether the OSM's historical implementation of the tax under its regulation implementing and assessing the tax comported with the underlying statute. *Consolidation Coal Co. v. United States*, 615 F.3d 1378, 1381 (Fed. Cir. 2010) (*Consol V*). Importantly, the parties agreed about what the regulation *did*: All agreed about when the tax applies and how it is calculated. The only question was how to characterize the tax imposed by OSM's regulation—as a tax on extraction or as a tax on sale. The parties agreed that a tax on extraction would be permissible,

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[2] To avoid confusion, we employ the same numbering system that the Federal Circuit did in the decision under review. That system includes both the Court of Federal Claims decisions and the Federal Circuit's decisions in this case.

but that a tax on sale would violate not only the statute (as construed in *Consol III*) but the Export Clause as well.

The Federal Circuit's innovation was to apply the avoidance doctrine not to interpret what the law prescribes, but to characterize what the Government had already done. In *Consol V*, the Federal Circuit invoked constitutional avoidance to characterize the tax already assessed by the OSM as a tax on extraction rather than a tax on sale. Ordinarily, the avoidance doctrine narrows or otherwise limits government action that might otherwise transgress constitutional norms. Here, however, the Federal Circuit's approach to avoidance broadened the Government's latitude by retroactively interpreting the Government's actions as constitutional. The appeals court adopted, in essence, the very position that *DeBartolo* rejected when the Court said that the NLRB was not entitled to simply presume that whatever Congress did was constitutional. The Federal Circuit's avoidance doctrine is thus a presumption that government actions are constitutional—but one that operates by recasting government conduct to always fall on the right side of the constitutional line.

This "tie goes to the runner" approach to constitutional avoidance could have far-reaching consequences if left uncorrected. Constitutional law is replete with close questions of characterization. Consider two hypothetical cases:

Case #1: A free speech case in which, under the limited-public-forum doctrine, the government may restrict discussion to certain subjects but may

not discriminate on the basis of viewpoint. The question is whether an exclusion of religious perspectives should be characterized as impermissible viewpoint discrimination or permissible subject-matter restrictions. *Cf. Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). If a court invoked the avoidance doctrine as a reason to characterize what the government did as permissible subject-matter restrictions, it would be making a category mistake.

Case #2: A Fourth Amendment case in which it is unclear whether the police acted with probable cause. A court plainly could not invoke the avoidance doctrine to characterize what the government did as legal.

By using the avoidance doctrine to construe problematic government action as legitimate—in effect, to view the Government's conduct in the best possible light—the Federal Circuit's approach effectively narrows the scope of constitutional rights by making it substantially more likely that government action impinging on those rights will be upheld.

B. The Federal Circuit's approach implicates traditional criticisms of the avoidance canon while capturing none of its virtues.

The avoidance doctrine is sometimes criticized for causing courts to reject an otherwise-persuasive reading of a statute or regulation on the basis of a constitutional "doubt" without engaging in the

careful analysis of the constitutional question that would follow if the court were to actually reach and decide the constitutional question.[3] Moreover, because at least some proportion of "doubtful" constitutional questions would presumably be resolved in the Government's favor if the courts were actually to reach and decide them, rejecting an otherwise-favored statutory construction on avoidance grounds tends to expand the impact of constitutional limits. As Judge Posner has argued, the canon sometimes creates a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself." Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983).

We do not take any position here concerning whether these criticisms would warrant limiting or altering the avoidance canon; the important point is that the Federal Circuit's version of the avoidance doctrine implicates the same concerns without furthering any of the canon's countervailing virtues. The Federal Circuit's approach encourages the same

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[3] *See, e.g.*, Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 90 (worrying that because courts applying the avoidance canon purport not to actually *decide* the constitutional question, courts "produce in reality the supposedly disfavored outcome of constitutional adjudication without the safeguard of reasoned elaboration that we associate with the exercise of that power"); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. Davis L. Rev. 1, 23 (1996) (arguing that "use of the canon yields changes in constitutional law without the protection of reasoned elaboration and without the Court taking responsibility for directly addressing constitutional questions").

cursory constitutional analysis that is sometimes imputed to the traditional avoidance doctrine, but in the opposite direction: In this case, for example, the court of appeals simply relied on the avoidance canon to characterize the tax as one on extraction, rather than engaging in the careful analysis of the incidence of the tax that would have been required had the court actually decided the constitutional issue.

Similarly, the Federal Circuit's approach creates a "penumbra" problem. Here, however, the penumbra surrounds the Government's action—not the constitutional provision at issue—ensuring that government acts will be characterized in a way that does not offend the Constitution if the case is at all close. As we have already noted, this rule has the effect of *narrowing* the scope of constitutional guarantees.

The Federal Circuit's decision in this case thus illustrates considerable confusion concerning the nature and proper application of the doctrine of constitutional avoidance. This case provides an excellent vehicle for resolving that confusion and demonstrating the doctrine's proper implementation.

II. Whether the Canon of Avoidance Trumps *Chevron* Deference Is an Important Question that Should Be Resolved by this Court.

The Federal Circuit's decision in *Consol V* relied on its earlier construction of the SMCRA in *Consol III* as imposing a tax on extraction rather than sale. *Consol III*'s construction of the statute rejected a contrary reading of the statute by the D.C.

Circuit in *Drummond Coal Co. v. United States*, 796 F.2d 503 (D.C. Cir. 1986). *See Consol III*, 528 F.3d at 1347-48. Both the Federal Circuit and the D.C. Circuit agreed that the SMCRA was ambiguous as to whether the tax was imposed on extraction or sale of the coal. Unlike *Consol III*, however, *Drummond* resolved that ambiguity by deferring under *Chevron U.S.A. Inc. v. National Resource Defense Council*, 467 U.S. 837 (1984), to the OMS's position that the tax should fall on sale. *See Drummond*, 796 F.2d at 507. The Federal Circuit, however, rejected *Chevron* deference because the avoidance doctrine pointed toward the opposite construction of the statute. *Consol III*, 528 F.3d at 1348.

A. The interaction of *Chevron* and the various canons of construction is pervasively important.

Federal statutes are frequently ambiguous. When an agency administers a statute, ambiguity may trigger *Chevron* deference (provided the other conditions for deference are met), but whenever the statute is susceptible to constitutional challenge, the same ambiguity frequently triggers the avoidance canon. This conflict can arise anywhere across the vast spectrum of federal regulatory action, and it has already created a split among the circuits as to how to proceed. *Compare, e.g., Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2nd Cir. 2008) ("[O]nce an ambiguous statute has been interpreted by the agency in charge of its implementation, we lack the authority to re-construe the statute, even to avoid potential constitutional problems.") (internal quotation marks omitted), *and Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) ("[T]he

constitutional avoidance doctrine . . . plays no role in the [step two] *Chevron* inquiry.") (Kozinski, J.), *with Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (McConnell, J.) (concluding that "constitutional avoidance *can* operate to preclude agency interpretations which raise substantial constitutional doubts").[4]

A related question arises concerning the interaction of *Chevron* and *other* canons of construction, such as the rule of lenity, see, e.g., *Bell v. United States*, 349 U.S. 81, 83 (1955), or the various federalism-based "clear statement" rules, *see, e.g. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). These canons often are related to the avoidance canon itself—the rule of lenity, for example, may help avoid due process concerns about unclear criminal statutes, while the federalism canons sometimes help avoid constitutional concerns about the reach of Congress's power. *See, e.g., Jones v. United States*, 529 U.S. 848, 858 (2000) (holding that Congress must speak clearly to regulate at the outer limit of its Commerce Clause authority). These more specific canons, however, also often serve purposes beyond merely avoiding constitutional questions; indeed, sometimes these canons are the only means available for *enforcing* certain otherwise under-enforced constitutional norms. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms,*

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[4] *See also Morales-Izquierdo*, 486 F.3d at 503-04 (Thomas, J., dissenting) (arguing that while the avoidance doctrine may not be relevant at step two of *Chevron*, it is "highly relevant at *Chevron* step one").

and the Preservation of Judicial Review, 78 Texas L. Rev. 1549, 1603-09 (2000).

It is thus important that, if the Court decides that the avoidance canon itself does not trump *Chevron* deference, the Court distinguish between the pure avoidance situation and these other canons. This case does not present the question whether *Chevron* deference overrides canons of construction designed to safeguard particular constitutional values, as opposed to the general value of avoiding unnecessary adjudication of constitutional questions.

B. The best answer is that the avoidance canon *should* trump *Chevron*.

On this question, we believe that the Federal Circuit got it right in *Consol III*—that is, that the avoidance doctrine requires federal courts to interpret statutes to avoid a serious constitutional doubt, even if the agency that enforces that statute has adopted a contrary interpretation. Notwithstanding the circuit split that has developed on the question, this Court's cases mandate that proposition. In *Hernandez-Carrera*, 547 F.3d at 1250, Judge McConnell considered it "well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due." As he pointed out, *DeBartolo* itself rejected—on avoidance grounds—the NLRB's interpretation of an ambiguous statute. Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001), this

Court rejected an agency's plea for *Chevron* deference on the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."

Applying the avoidance canon in agency cases comports with this Court's interpretation of *Chevron* as resting on Congress's intent to delegate interpretive authority to an agency. As this Court has frequently recognized, the avoidance canon is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005).[5] The avoidance canon is thus consistent with the structure of the *Chevron* inquiry. *Chevron* step one requires a court to consider whether the statute is unambiguous using all the traditional tools of statutory construction. The avoidance canon is such a tool. This Court's opinion in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 985 (2005), confirmed this logic when it noted that the court of appeals had "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment." *Brand X* thus recognized that a court could properly find that Congress had *not* delegated interpretive authority to the agency either on the basis of plain

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[5] *See also DeBartolo*, 485 U.S. at 575 ("This [avoidance] approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

statutory text *or* on the basis of some "other rule of construction"—that is, a canon like the rule of lenity or the avoidance canon.

Finally, judicial enforcement of the avoidance canon as a constraint on *Chevron* deference reflects the comparative institutional competences of agencies and courts. Holding that *Chevron* trumps the avoidance canon would effectively give agencies the primary authority for construing federal statutes to avoid constitutional doubts. Because an agency's interpretation of an ambiguous statute would bind the federal courts, the only opportunity for constitutional avoidance would occur when the agency interpreted the statute in the first instance. But this method makes little sense in terms of *Chevron*'s underlying rationale. As this Court has explained, it is plausible to construe statutory ambiguity as a congressional delegation of interpretive authority to the administering agency under *Chevron* because agencies are (a) more democratically accountable and (b) more expert than courts within the scope of the particular statute they administer. Neither of these rationales applies in the avoidance context.

Constitutional values implicate the courts' countermajoritarian mission. *See, e.g.*, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). The agency's greater democratic accountability hardly favors relying on agencies to apply the avoidance canon. Like the NLRB in *DeBartolo*, agencies are more likely than courts to discount constitutional concerns in the face of public pressure and deference to political actors. After all, agencies serve as agents

of—not checks upon—the political branches. They are ill-suited to play a countermajoritarian role.

Likewise, agencies are not particularly expert at constitutional interpretation, to the extent that their organic statutes allow them to consider constitutional challenges at all. *See, e.g.*, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 758 (2008) (noting that "agencies know little about constitutional law"). Constitutional questions generally will not implicate the agency's technical or scientific expertise. Federal courts are, in most cases, more familiar with the constitutional issues raising to constitutional doubts and thus better positioned to determine whether those doubts are serious. Just as federal courts would never defer to an agency's interpretation of an ambiguous *constitutional* provision, there is no reason to allow an agency to conclusively determine whether a statute should be interpreted to avoid a constitutional problem.

C. The Federal Circuit's correct resolution of the conflict between the avoidance doctrine and *Chevron* does not save its application of the avoidance doctrine to the OMS's regulation.

This Court should clearly hold that courts should apply the avoidance doctrine even in the face of a contrary interpretation by the federal agency that administers the relevant statute. However, even though the Federal Circuit was right not to defer to the agency's prior interpretation of the tax statute at issue in this case, the court of appeals

fundamentally misunderstood the way the avoidance canon works. It was wrong to apply that canon in *Consol V* to the *regulation*, because it was clear (and undisputed) how that regulation applied to the situation at issue. The right application of the avoidance canon would have been to hold the regulation inconsistent with the underlying statute.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Steven P. McGowan
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326
(304) 353-8114

Ernest A. Young
Counsel of Record
127 Turvey Court
Chapel Hill, NC 27514
(919) 613-8506
Young@law.duke.edu

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Counsel for Amici Curiae